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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
GTE TELEPHONE OPERATING COMPANIES Tariff F.C.C. No. 1	)	Transmittal Nos. 873, 874, 893, 909, 910
	)	
Video Channel Service at Cerritos, California	)	CC Docket No. 94-81

To: Chief, Common Carrier Bureau

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PETITION FOR LEAVE TO FILE
AND
RESPONSE TO GTE REPLY

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SUMMARY

In its Reply, GTE has advanced new arguments and requests for relief which exceed response to Apollo's Opposition. In addition to modifying its sole initial request for a declaratory ruling, for example, GTE now requests two additional Commission declarations. Fundamental fairness requires that Apollo be afforded an opportunity to response to such new matters.

With respect to GTE's initial declaratory ruling request, the carrier now abandons its earlier contention that Apollo's successful pursuit of civil breach-of-contract damages would constitute a "rebate" under Section 203(c) of the Communications Act. GTE's Reply now emphasizes that such damages would represent a "preference" under that statute. However, "preferences" are dealt with in Section 202(a) of the Act, not Section 203, and there are no precedents which have construed either Section 202 or Section 203 in any way even faintly approximating the interpretation GTE here urges.

The principal argument in support of GTE's revised declaratory request is one which relies on verbal sleight of hand. Characterizing future state court damages calculations as necessarily including a determination of a "reasonable rate" for the bandwidth at issue, GTE argues that tariff-related "reasonable rate" determinations are reserved to the Commission, and such state court calculations would conflict with the Commission's authority over the Transmittal No. 909 charges. In fact, that tariff is exclusively one for GTE Service Corp. and does not apply to Apollo. The state court action will involve no examination whatever of the propriety of charges to GTE Service Corp. under that tariff, and a

damages award would have no effect whatever on the Commission's governance of any current or future tariff filing. To the extent the state court ascertains "the then reasonable market rent" for the bandwidth -- the contract term for the agreed-on charge for Apollo's use of the additional bandwidth -- use of that figure in assessing damages resulting from GTE's providing the bandwidth to its affiliate will in no way infringe on the Commission's authority or discretion.

As now expressed, GTE's position can best be understood by reference to the following hypothetical:

> On January 1, Carrier X agrees to build and lease a cable system for CableCo 1's use at a monthly rate of $25,000 beginning September 1. After commencing construction, Carrier X is approached by CableCo 2, which offers to pay $35,000 per month for use of the system. On August 1, Carrier X tariffs the system to CableCo 2 and thereafter commences service to that entity. CableCo 1 sues Carrier X for breach of contract, and seeks monetary damages.

Under GTE's theory, the tariff filing would abrogate Carrier X's agreement with CableCo 1 since the tariff was "mandated." Moreover, the tariff filing would preclude -- as inconsistent with the Commission's jurisdiction over the filed tariff rate to CableCo 2 -- any civil suit or breach-of-contract damages by CableCo 1 based on its business plans for a $25,000 per month lease/tariff expense, because that figure would differ from the tariff rate for CableCo 2. Acceptance of GTE's unprecedented theory in a Commission construction of Section 203(c) would be arbitrary and capricious in the extreme. The ability to bring and pursue civil contract actions in such a circumstance is preserved by Section 414 of the Act.

GTE's Reply improperly seeks two additional declarations: (1) that the Commission "has asserted Title II authority" over the Cerritos facilities, and (2) that GTE was required to file the challenged Cerritos tariffs. While characterizing them as reiterations of prior rulings -- in itself a reason to deny the requested declarations -- GTE actually seeks a significant enlargement of prior holdings with respect to Cerritos. The Commission has not "asserted Title II authority," as GTE intends the first of its newly-requested declarations to mean. This agency has only ruled that Section 214 certification requirements apply to GTE's Cerritos facilities, and has not spoken to tariff or other "Title II" matters (governed by other statutory provisions) as they may relate to the Cerritos project.

GTE's second new requested declaration -- that GTE was required to file dual tariffs for the Cerritos system after expiration of the cross-ownership waiver in 1994 -- is even more inaccurate. In fact, the Commission specifically left to GTE how to handle the post-waiver circumstance, and GTE acknowledges that tariffing the service was but one of the available "options" available to it -- the "option" it chose for business, not regulatory, reasons.

The new positions GTE now advances confirm the need for a prompt denial of the carrier's motion. The requested declarations are wrong as a matter of law, and are sought, not to resolve a controversy within the Commission's jurisdiction, but to aid GTE's litigating position in a civil contract dispute before a state court. The carrier has provided no proper basis for the Commission to issue any of the declaratory rulings requested.

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To: Chief, Common Carrier Bureau

PETITION FOR LEAVE TO FILE
AND
RESPONSE TO GTE REPLY

Apollo CableVision, Inc. ("Apollo"), by its attorneys, respectfully requests leave to file, and have considered, Apollo's following response to the "Reply of GTE California Incorporated to Apollo's Opposition for Declaratory Ruling," filed March 15, 1995 (hereinafter "Reply").

I. THE PETITION FOR LEAVE TO FILE

The "Motion for Declaratory Ruling" by GTE California Incorporated ("GTE") was filed herein February 8, 1995 ("Motion"). On February 23, 1995, Apollo duly opposed the Motion in an "Opposition to GTE Motion for Declaratory Ruling" ("Opposition"). Pursuant to Commission allowance (Public Notice dated February 27, 1995, DA 95-365), a "Reply of GTE California Incorporated to Apollo's Opposition for Declaratory Ruling" was submitted on March 15, 1995 ("Reply").

As shown in the responsive comments which follow, however, the GTE Reply contained entirely new matters, contrary to Rule Section 1.45(b)'s admonition that replies "shall be limited to matters raised in the oppositions." Thus, for example, not only does GTE's Reply modify the declaratory ruling initially requested, it now requests two additional declarations (Reply, p. 3).

Because it has not had an opportunity to address the new matters raised in the Reply, and since the relief GTE seeks vitally affects Apollo's interests, leave to submit, and have considered, the responsive comments which follow is respectfully requested.

II. RESPONSE TO GTE'S REPLY

A. GTE Has Altered Its Initial Declaratory Ruling Request

In its Motion (p. 1), GTE requested the Commission to declare --

> . . . that the relief requested by [Apollo] as damages in its First Amended and Supplemental Complaint filed in the Superior Court of the State of California . . . constitutes a preference or rebate in violation of Section 203 of the Communications Act of 1934, as amended. . . .[1/]

The carrier proceeded to support its request by arguing that Apollo's recovery of civil damages would "violate Section 203(c) of the Act in that it operates as an unlawful preference or rebate" (Reply, pp. 5-9), and by contending that a civil damages award would be inconsistent with the "filed rate doctrine" (Reply, pp. 9-12).

[1/] See also, e.g., Motion at pp. 13-14 (the Commission has "an absolute duty . . . [to] determine[ ] that Apollo's request for damages constitutes an unlawful preference or rebate in direct violation of Section 203").

In the face of Apollo's showing both the irrationality of declaring that its civil damages recovery would be a "rebate" under Section 203(c) (Opposition, pp. 19-21), and the patent infirmity of GTE's "filed-rate doctrine" position (Opposition, pp. 21-26),[2/] GTE's Reply shifts ground substantially. While still identifying Section 203(c) as the principal focus of its request, what GTE actually wants the Commission now to declare in that regard is totally confused.

At one point, GTE refines its initially requested declaration to read --

> That Apollo's requested relief, if calculated using some state court determined "reasonable rate," would violate the rate-filing provision of Section 203 of the Act which forbids a customer from receiving a preference or rebate from a common carrier.

Reply, pp. 3-4 (emphasis added). Elsewhere, the ruling sought is described as one whereby GTE --

> . . . seeks a specific ruling that damages calculated pursuant to contract terms which

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[2/] At pages 8-13 of its Reply, GTE seeks to blunt Apollo's demonstration (Opposition, pp. 21-26) that the "filed rate doctrine," on which GTE continues to rely, provides no support for the initially-requested declaration. Confronted with the dispositive discussion in U.S. Watts, Inc. v. American Tel. & Tel. Co., 1994 U.S. Dist. LEXIS 4074 (E.D. Pa. 1994), appended to Apollo's Opposition, GTE seeks either to distinguish Apollo's citations, or to employ citations in the U.S. Wats analysis, based on a characterization of Apollo's civil suit as seeking enforcement of a rate for service to itself different than a properly tariffed rate for that service. As pointed out elsewhere, however, there is no tariff rate for the second half of the bandwidth available to Apollo, and its request for civil damages does not dispute GTE's Transmittal No. 909 rates for its affiliate's use of that bandwidth. Here, as in U.S. Wats --

> . . . there is no reason to believe that the court's resolution of [Apollo's] contract claim will either interfere with the FCC's authority over the reasonableness of [GTE's] rates or result in a rate preference for [Apollo].

Id. at *19-*20. Apollo continues to rely on its Opposition discussion of this matter.

> directly contradict the tariff rates violate Section 203(c).

Reply, pp. 6-7 (emphasis omitted).[3/] At yet other points, GTE appears also to want pronunciations concerning the consistency of Apollo's recovery with "the rate-filing provision of Section 203" (Reply, p. 4; emphasis added), and with unnamed portions of the statute which establish "the Commission's authority to establish the reasonableness of rates." (Reply, p. 15).[4/] In this last respect, GTE newly (and continuously) argues that, in considering Apollo's requested relief, the state court will be improperly determining a "reasonable rate" for the second half of the band-width now tariffed to GTE Service Corp. -- a rate-making function reserved to the Commission under the Communications Act. (E.g., Reply, pp. 1, 2, 4, 5 n.5, 7 n.6, 9, 10, 13, 14, 15.)

[3/] So framed, GTE's new formulation is inconsistent with its earlier position that its filed tariffs do not conflict with the parties' earlier contract undertakings:

> [A]llegations made by Apollo that the tariffs depart significantly from the business relationships established in supplanted GTECA-Apollo agreements are erroneous and conflict with the very language of the agreements themselves.

"Comments of GTE," September 15, 1994, p. ii. See also GTE's "Consolidated Reply to Petitions to Reject or Suspend Tariffs," June 1, 1994, pp. iv, 14-17.

[4/] Other GTE descriptions of the declaration it desires include the following:

> [Apollo's damages recovery] would operate as an undue preference in violation of Section 203(c). [Reply, p. 10; emphasis added.]
>
> . . . Apollo's state court action infringes upon the anti-discriminatory rate provision of Section 203(c) . . . [Reply, p. 10; emphasis added.]
>
> [A] controversy clearly exists . . . as to whether Apollo's state court action violates the anti-discriminatory rate provisions of the Act. [Reply, p. 5; emphasis added].

Aside from altering its sole initial request and supporting arguments, GTE's Reply now asks the Commission for two additional declarations:

> (1) that the Commission has asserted Title II authority over GTE's Cerritos video network, and (2) that upon expiration of the good cause waiver GTE's provision of video signal transport to Apollo (and [GTE] Service Corp.) could only continue under tariff.

Reply, p. 3. For the reasons discussed below, Apollo believes GTE's new requests and positions to be procedurally improper, and substantively without merit.

B. Even As Modified, GTE's Requested Declaration Concerning Section 203(c) of The Act Is Deficient

Because, as noted above, GTE's rhetoric with respect to the statute continuously changes, it is important to keep clearly in mind the words of the statute the Commission is being asked to interpret. It is also important to be aware that there are no decisions, administrative or judicial, construing Section 203(c) of the Act (or its predecessor, the now-repealed Section 6(7) of the Interstate Commerce Act, formerly 49 U.S.C. § 6(7)) as GTE here urges.[5/]

The three subparagraphs of Section 203(c) forbid common carriers, with respect to tariffed services, to --

> (1) charge, demand, collect, or receive a greater or less or different compensation, for such communication, or for any service in connection there with, between the points named in any such schedule

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[5/] Indeed, the few FCC rulings specifically addressing Section 203(c) rejected arguments that the carrier's extra-tariff activities involved violated the statute. AT&T Private Payphone Commission Plan, 3 F.C.C.2d 5834 (C.C. Bur. 1988), recon. denied, 71 R.R.2d 801 (1992); National Telephone Services, Inc., 71 R.R.2d 1157 (C.C. Bur. 1993).

> than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities, in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges except as specified in such schedule.

In its Motion, GTE asserted that any civil damages recovered by Apollo would constitute an unlawful "rebate" under Section 203(c).[6/]

The only portion of Section 203(c) on which that assertion could have been based is subsection (2), which forbids carriers to "refund" or "remit" tariff charge payments. In light of the obvious -- Apollo is not paying any tariff charges for the bandwidth at issue, and there are no tariff payments GTE could therefore "refund" or "remit" (see Apollo's Opposition, p. 20) -- GTE's Reply abandons the "rebate" notion. Instead, GTE shifts emphasis: an Apollo civil damages recovery would now represent an impermissible "preference" under Section 203(c). (E.g., Reply, pp. 4, 6, 10.)[7/]

With subsection (2) of Section 203 eliminated as a possible basis for a Commission declaration, the question becomes which of the remaining subsections, (1) or (3), is GTE's current point of reliance? It cannot be subsection (1), which deals with carriers

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[6/] See, e.g., Motion, pp. ii, 1, 9, 11, 14. As expressed at one point (Motion, pp. 8-9):

> In essence, Apollo would pay the filed tariff rate for the lease of the excess bandwidth with one hand, and then receive a rebate from GTE in the form of damages with the other hand.

[7/] The word "preference," of course, does not appear anywhere in Section 203, and the preference concept is reflected in Section 202(a) of the Act.

charging customers more or less than tariff rates. For Apollo isn't using the second half of the system bandwidth, and GTE isn't "charg[ing], demand[ing], collect[ing], or receiv[ing]" anything from Apollo for those channels; GTE Service Corp. is occupying, and is presumably paying for, that portion of the system bandwidth.

What remains is subsection (3), which forbids carriers, in their furnishing of tariffed services, to "extend . . . any privileges or facilities, . . . or [to] employ or enforce any classifications, regulations, or practices affecting . . . charges," other than as provided in the tariff. Yet a pronouncement that Apollo's recovery of damages would violate this provision would be as irrational as concluding that subsections (1) or (2) apply. Were GTE compelled to pay civil damages, it would not be "extend[ing] . . . any privileges or facilities" of <u>any</u> sort with respect to <u>any</u> tariffed service received by Apollo. Neither would GTE be "employ[ing] or enforc[ing] any classification, regulations or practices affecting . . . charges" to Apollo different than those contained in a tariff under which Apollo had received service.

The ultimate facts remain dispositive. The second half of the Cerritos bandwidth is tariffed for, and is being used exclusively by, GTE Service Corp.; Apollo is receiving no tariffed services in that regard as to which GTE could "extend" off-tariff "privileges or facilities," or "employ" off-tariff charging

schemes.[8/] A Commission declaration that the recovery of breach-of-contract damages from GTE for a refusal to make the second half of the bandwidth available to Apollo would violate Section 203(c)(3) -- which assumes an under-the-table variation from tariffed services already available to (and being used by) a customer -- would be patently arbitrary and capricious.

C. GTE's Additional Requests For Declaratory Ruling Should be Summarily Dismissed

Preliminarily, it should be noted that while GTE's newly requested declarations are improper for reasons discussed below, they are also significant in evaluating the propriety of the sole declaration initially sought. For GTE now acknowledges that certain predicates for the requested construction of Section 203(c) of the Act may not have yet been established. In its Reply (p. 3), GTE recognizes that the initially-requested Section 203(c) declaration "[a]ssum[es] the Commission has asserted its Title II authority and that tariffs were required." For that reason, GTE now requests that the Commission utter two more declarations (Reply, p. 3):

> (1) that the Commission has asserted Title II authority over [GTE's] Cerritos video network, and (2) that upon expiration of the good cause waiver [GTE's] provision of video signal transport to Apollo (and Service Corp.) could only continue by tariff.

[8/] At one point, GTE unwittingly accepts that notion:

> Thus, regardless of who leases the bandwidth (whether it be Service Corp., Apollo or a third party), such lessee is subject to the terms of the filed tariff. [Reply, p. 8; emphasis added.]

If indeed these declarations are mere "reiterations" of prior rulings, as GTE contends,[9/] the requests should be summarily rejected as unnecessary. But in fact, GTE seeks more than a mere repetition of prior holdings.

1. The requested declaration concerning Title II is inaccurate and dangerously broad

The parties here do not disagree that the Commission has exercised some elements of Title II jurisdiction with respect to Cerritos.[10/] Apollo has acknowledged what is undeniable -- that the Commission determined the need for, and granted, Section 214 authority before the Cerritos facilities could be built and operated. That determination, however, was not tantamount to a Commission determination that all aspects of Title II were appli-

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[9/] See Reply, p. 3:

> [I]t seems that Apollo will continue to advance [contrary] arguments . . . unless and until the Commission reiterates its prior rulings [in the requested declarations].

[10/] In its Reply, GTE distorts Apollo's Opposition discussion in this regard:

> Apollo . . . insists that the Cerritos network is not subject to the Commission's jurisdiction. [Reply, p. 6.]
>
> . . . Apollo asserts that the Commission does not even have Title II authority over GTECA's Cerritos network. (Opposition, at 9.) [Reply, p. 2.]

The cited portion of Apollo's Opposition (p. 9), however, said no such thing:

> First, neither the Bureau in 1988, nor the Commission in 1989, uttered any decisional wording even remotely suggesting the applicability of all Title II requirements to the Cerritos project. To be sure, both rulings dealt with certifying the Cerritos cable system's construction and use under Section 214 of the Act. But neither ruling referred to the future need to file tariffs of any sort. To the contrary. Even the need to include "illustrative tariffs" with the Section 214 application at the time was dispensed with. [Emphasis omitted.]

cable to the Cerritos system. More particularly, the Section 214 determination was not -- as GTE would now like it -- a ruling that Section 203 tariff requirements were ipso facto applicable. As detailed in Apollo's February 23, 1995 Opposition herein (pp. 8-10), the Commission has never so held in the Cerritos proceedings. And as a matter of general law and precedent, the Commission has granted Section 214 certification for facilities and provision of services for which tariffs are not required.[11/]

In short, aside from its other flaws, GTE's first new request is fatally overbroad. The Commission's rulings authorizing the Cerritos project did not "assert Title II authority" over the facilities and services; they held that Section 214 authority was required. To now declare that its "prior rulings" held that all of the Title II requirements were applicable to Cerritos would be patently inaccurate.

2. The requested declaration concerning the need for tariffs is inaccurate and deceptive

GTE's second new request is equally infirm. A declaration that, after expiration of the good cause waiver, GTE could only continue to provide video signal transport pursuant to tariff assumes at least two factors currently in dispute: (a) that continued service to Apollo was common, rather than private, carriage;

[11/] See, e.g., Apollo's Petition to Reject or Suspend Tariffs, filed May 17, 1994, at pp. 14-19; Application for Review filed August 1, 1994, at pp. 6-12; Letter dated July 8, 1994, from James S. Blaszak to David Nall, FCC, Memorandum of Law, at pp. 3-10. See also, e.g., Lightnet, 58 R.R.2d 182 (1985).

and (b) that GTE had no alternative in 1994 to filing the tariffs it did.

As to the common vs. private carriage issue, Apollo's unopposed appeal of the Bureau's ruling on the matter is currently pending before the Commission. (Application for Review, filed August 1, 1994.) That issue is therefore not finally resolved, and the requested declaration would improperly prejudge Apollo's appeal.

Concerning any legal compulsion that GTE file the Cerritos tariffs, the parties' pleadings confirm otherwise. First, as GTE now finally concedes,[12/] there was no statutory or regulatory compulsion that GTE file any tariffs with respect to Cerritos. The only legal requirement for GTE with respect to Cerritos was that it "come into compliance with the telephone company/cable television cross-ownership restriction". General Telephone Company of California, 8 F.C.C. Rcd. 8178, 8182 (1993). At long last acknowledging that filing tariffs was but one of a number of "options" for satisfying the Commission's directive, GTE argues that tariff filing was "the only viable option," since pursuing other available alternatives would have caused "irreparable injury." (Reply, p. 3, n. 3; emphasis added.)[13/] There may have been some GTE-perceived

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[12/] See Reply, p. 3, n. 3 ("the Commission did not precisely specify how GTECA could come into compliance when the waiver expired").

[13/] GTE's assertion of such "irreparable injury," of course, was comprehensively rejected by the Commission in General Telephone Company of California, 8 F.C.C. Rcd. 8753, 8754 (1993) (denying GTE motion for stay):

> . . . GTECA has failed to demonstrate that it will suffer irreparable harm if a stay is not granted. First, the original waiver, granted to GTECA in July 1989, was expressly limited in duration to five years. Irrespective of any

[Continued on next page]

business imperative, but tariff filing was not a regulatory directive.

Second, for the reasons set forth in Apollo's earlier pleadings, even if it were assumed arguendo that some form of tariffing for Cerritos was appropriate, the content of the specific tariffs GTE formulated for the two halves of the Cerritos system -- the content of which the carrier now agrees conflict with the

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> action by the Commission on remand, GTECA's conditional, temporary waiver was set to expire by its express terms in July 1994. Thus, absent an extension of the original waiver, GTECA's experimental activities in Cerritos would have had to cease in July 1994. Under the Commission's decision on remand, GTECA's experiment would terminate in March, rather than July 1994. Under the Commission's decision on remand, GTECA has not shown how terminating the five year experiment four months early will cause the company irreparable harm. Indeed, given that GTECA will have conducted experimental activities in Cerritos for approximately 56 months out of the original 60 month waiver period, it is difficult to imagine how GTECA could make the requisite showing of irreparable harm.
>
> 7. Further, we note that any alleged harm that may be caused results in part from GTECA's own business decision to proceed with construction and operation at its own risk. As early as 1988, prior to the Commission's review in the *Cerritos Order* of the Common Carrier Bureau's grant of a staff-level waiver, GTECA was put on explicit notice that it "necessarily assumes the risk that if the Bureau's decision is reversed, it may have to undo, at some cost and inconvenience to itself, actions it took in reliance on that decision -- which in this case may involve the sale or dismantling of partially constructed cable facilities." Moreover, after the court remand in 1990, GTE continued with its experimental activities with full knowledge that the court had faulted the Commission's original grant of waiver and directed the Commission to revisit the issue. Under these circumstances, GTECA cannot plausibly argue that its business plans and relationships have been unfairly disrupted by the Commission's remand decision and that it will suffer irreparable harm as a result of the Commission's action. [Footnotes omitted.]

Apollo/GTE agreements[14/] -- was wholly a matter of GTE's business choice, not a result of legal compulsion.

Against this background, a Commission declaration that GTE's provision "of video signal transport to Apollo (and Service Corp.) could only continue under tariff" would plainly be arbitrary and capricious.

3. The Commission should not volunteer gratuitous declarations for GTE's civil litigation purposes

The Commission must recognize the practical motivation for GTE's new requests. At issue in the state court is whether GTE's decision to file the tariffs at issue was a breach of the carrier's agreements with Apollo. As part of its defense, GTE is relying on paragraph 19 of the 1987 Lease Agreement between the parties which states, in part:

> If . . . the FCC claim[s] Title II jurisdiction over the service provided by [GTE], [Apollo] shall be subject to the rates, terms and conditions such agency may impose.[15/]

The carrier's effort is to persuade the court that the Commission "claim[ed] Title II jurisdiction over [GTE's] service" -- thus requiring GTE to file Transmittal Nos. 893 and 894 -- and that the "rates, terms and conditions" contained in those tariffs have

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[14/] See Reply, pp. 6-7 ("GTECA seeks a specific ruling that damages calculated pursuant to contract terms which directly contradict the tariff rates violate Section 203(c)" (emphasis in original)).

[15/] Lease Agreement dated January 22, 1987, ¶ 19, appended to GTE's Motion as Exhibit B. It is that same paragraph, ironically, which states "that the bandwidth capacity subject to this Agreement is provided on a non-common carrier basis, individually negotiated and tailored to meet the particular needs of [Apollo] and characterized by a long-term Lease with a customer expected to operate a stable business."

therefore been "imposed" on Apollo. Fearful that its evidence and arguments in the state court will not suffice, GTE, in its now-enlarged request for declaratory rulings, asks the Commission to provide GTE purposely vague statements which track part of the contract wording to assist in the civil litigation. The Commission should summarily decline that invitation.

D. GTE Efforts To Fashion A Jurisdictional Conflict Between The Commission And The State Court Are Purely Word-Play

The arguments in GTE's Reply do not really deal with Section 203(c) of the Act at all. Rather, stripped of all distracting hyperbole, GTE's position now appears to be that, if any damages under California contract law are based on the state court's determination of what "the then reasonable market rent" for the bandwidth is or was, as provided in paragraph 21(a) of the GTE-breached Lease Agreement between Apollo and GTE (as amended in June 1989), such a determination would impermissibly impinge on the Commission's authority to determine "reasonable rates" under some unspecified portion of Section 203 of the Communications Act.[16/] In GTE's view, by "asking the state court . . . to ignore the tariff rate and opine its own rate for the bandwidth[,] . . . Apollo is

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[16/] As part of its arguing technique, GTE continuously employs the phrase "reasonable rates" -- which would normally connote the Commission's statutory area of tariff regulation -- to describe what is before the state court. Indeed, at various points, GTE's rhetoric in this regard borders outright distortion. For example --

> Apollo's complaint expressly asks the state court . . . to set its own "reasonable rate" for the tariffed service.

Reply, p. 9. In fact, Apollo's action addresses only the parties' contract wording and its meaning, including the phrase "the then reasonable market rent" -- a phrase which does not denote the Transmittal No. 909 charges (or any other tariff "rates").

specifically seeking to undermine the Commission's exclusive jurisdiction over the rates which GTE may charge for a common carrier service." (Reply, p. 2.) Indeed, in the thrill of advocacy, GTE paints the court as a rival regulatory forum where Apollo is urging "that the state court reject the tariff rate for the bandwidth and determine its own rate."[17/] To permit such a result, the carrier contends (again and again, in varying ways), would invade the Commission's authority and discretion over tariff matters under the Communications Act. And since the state court rejected GTE's teachings of FCC primary jurisdiction over the parties' contract dispute, "the Commission must intervene in order to preserve its ratemaking authority." (Reply, p. 13.)

Nonsense.

First, the only extant tariff rate argued to be related to Apollo's suit is that in Transmittal No. 909 (earlier, Transmittal No. 874). However, that tariff deals exclusively with service to GTE Service Corp.; the service is not available -- and the rates do not apply -- to Apollo.[18/] Apollo's suit does not challenge what

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[17/] At one point, GTE resorts to outright distortion in this regard. At page 5, note 5 of its Reply, GTE describes as "perfectly clear" that the state court will "set its own rate for the bandwidth," and posits a court "belief" that "it may make its own determination of the reasonableness of the rate for the bandwidth." That statement is based on the following sentence in the transcript of the court's January 24, 1995 hearing (found at Apollo Opposition, Attachment 1):

> The FCC is not concerning itself with any private matters regarding the contract between the plaintiff and defendant from what I can see except to the extent it awaited to be briefed on how the tariff affected the contract.

GTE's characterization exceeds any reasonable reading of the cited reference.

[18/] GTE filed its Transmittal No. 874 to "establish[] rates and charges for Video Channel Service . . . to meet the specific needs of GTE Service

[Continued on next page]

GTE is charging GTE Service Corp. under Transmittal No. 909, does not ask the court to "reject" the tariff rates, and does not ask for any judicial determinations either that the Transmittal No. 909 rates are "unreasonable" under the Communications Act or that they should be different. What will be consequential for civil suit purposes is that GTE chose to tariff the bandwidth to any third party -- thus voluntarily disabling itself from meeting its contract obligation to Apollo -- irrespective of the third-party tariff rate. Apollo's complaint calls for no court interference whatever with the Commission's review of Transmittal No. 909 -- indeed, the Amended Complaint's new claims for relief assume the tariff's existence.

Second, contrary to GTE's contentions, many elements of Apollo's injury claims do not depend on the court's determination of "the then reasonable market rent" for the bandwidth now tariffed to GTE Service Corp. As reflected in the Amended Complaint (Exhibit C to GTE's Motion), two claims for relief were added to that specified in April, 1994 (before GTE's tariffs were filed with the Commission). In the first, Apollo asserts breaches of implied covenants of good faith and fair dealing vis-à-vis GTE and GTE

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Corporation" (GTE transmittal letter dated April 22, 1994, p. 1). The proposed tariff provision (§ 18.4.1(B)) identified GTE Service Corporation as the specific entity to whom the service was to be provided. And the accompanying "Description and Justification" repeatedly confirmed the tariff to be designed for that entity alone. E.g., D&J at p. 1 ("the accompanying tariff establish[es] Video Channel Service to meet the specific needs of GTE Service Corporation"). The September, 1994 resubmission of that tariff as Transmittal No. 909 was said to "reinstate[] rates and charges for Video Channel Service for GTE Service Corporation" contained in Transmittal No. 874, and the tariff content was indeed identical. (GTE transmittal letter dated September 9, 1994, p. 1.)

Service Corp. with respect to the interrelated series of agreements among the parties between 1987 and 1991. Apollo also asserts breaches of non-competition agreements between itself and both GTE and GTE Service Corp. (Amended Complaint, ¶¶ 19-24.) In the second claim for relief, Apollo asserts that both GTE and GTE Service Corp. have unlawfully interfered with Apollo's relationship with present and future customers in Cerritos, and that such conduct was willful and malicious. (Id., ¶¶ 25-30.)

Within that framework, there are a number of potential damage calculations and awards which do not depend on any assumed cost for additional bandwidth. For example, injury from breach of the non-competition provisions -- including, for example, the reduction and impairment of existing business -- does not depend on additional-bandwidth assumptions. Reduction in the value of Apollo's existing business resulting from GTE's withholding the bandwidth and creating a cloud over the future viability of Apollo's current operations requires no ascertainment of "rates" for more bandwidth. Punitive damages will not be "rates"-dependent. And such other, usual claims for attorneys fees and other costs of suit do not rely on any "rates" baseline.

Third, even if the state court were to ascertain, as an element in calculating some portion of monetary damages, that "the then reasonable market rent" for the bandwidth at issue was a figure other than that GTE has chosen to tariff for its affiliate, there would be no invasion of the Commission's prerogatives. Such a determination would not address the propriety of -- and would have no effect on -- the Transmittal No. 909 rates; that matter will be dealt with by the Commission alone, based on statutes,

regulations and policies distinct from those involved in the civil suit. Neither would a court determination of "the then reasonable market rent" in calculating some damages compel GTE's filing of tariffs providing service to Apollo at such levels, or otherwise alter existing tariffs. Rather, any such calculations would be employed only to assess damages for GTE's having voluntarily chosen a course which precluded meeting its contract obligations.

Content with frequent belches of rhetorical smoke, GTE has failed to demonstrate any specific way in which, for example, the court's normal adjudicatory activities would "undermine the Commission's exclusive jurisdiction over the rates which GTE may charge for a common carrier service." (Reply, p. 2.) Nowhere has the carrier particularized how the court's award of monetary damages -- the basis or scope of which the Court has yet even to address, much less grant -- would impact on conflict with the Commission's statutory authority or duties.

The fundamental question posed in Apollo's civil complaint -- either by its terms or by its effects -- is not whether the Transmittal No. 909 rate to GTE Service Corp. is "reasonable" under the Communications Act; that is a determination the Commission will make. The issue in state court is whether GTE's refusal to make the bandwidth available to Apollo in accordance with its contracts was a breach of the parties' agreements. GTE has effectively conceded that there was no legal compulsion to file the tariffs -- that there were other "options" available, but that as a matter of business judgment, it chose to make a tariff filing. (Reply, p. 3, n. 3; emphasis added.) The state court can evaluate those factors -- and assess any appropriate damages -- without in any way inter-

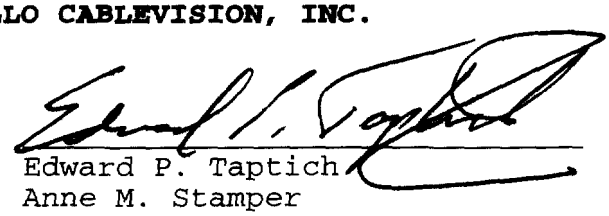
fering with the Commission's authority and discretion over any current or future tariff rates.[19/]

E. Conclusion

For the reasons set forth above, and in Apollo's February 23, 1995 Opposition herein, Apollo urges the Commission to dismiss GTE's Motion at the earliest possible time.

Respectfully submitted

APOLLO CABLEVISION, INC.

By: 

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[19/] Apollo's Opposition (pp. 14-19) argued that Section 414 of the Act barred a grant of the declaratory ruling initially requested. GTE's Reply seeks summarily to distinguish the statute and precedents "in that they involve state law claims which neither conflict with the Act nor interfere with the regulatory scheme of the Act." (Reply, p. 14.) In GTE's view, because Apollo has asked the state court to determine "reasonable rates," such "conflict" and "interference" is present. In light of the discussion above, the preclusive effects of Section 414 on issuing the requested declarations remain clear.

CERTIFICATE OF SERVICE

I, Roberta Schrock, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 28th day of March, 1995, caused a copy of the foregoing document to be served on the following by first-class U.S. mail, postage prepaid:

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